

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : William P. Clune et al.	Art Unit : 1791
Patent No. : 7,438,847	Examiner : Russell J. Kemmerle III
Issue Date : October 21, 2008	Conf. No. : 5924
Serial No. : 10/803,682	
Filed : March 18, 2004	
Title : DELIVERING RESIN FOR FORMING FASTENER PRODUCTS	

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPLICATION FOR PATENT TERM ADJUSTMENT UNDER 37 CFR § 1.705(d)

Applicants hereby petition for reconsideration of the Patent Term Adjustment (PTA) accorded the above-referenced patent application. The Issue Notification mailed October 1, 2008, for the above-referenced application indicates that the Patent Term Adjustment at issuance is 986 days. Reconsideration of the Patent Term Adjustment calculation to increase PTO Delay from 1007 days to 1252 days, and to increase Total PTA from 986 to 1231 days, is respectfully requested.

REVIEW OF PATENT TERM ADJUSTMENT CALCULATION

A review of the Patent Term Adjustment History in the PAIR system shows that the United States Patent and Trademark Office (PTO) calculated the Patent Term Adjustment (PTA) as follows:

- 1) The PTO mailed a delayed 14-month first non-final Office Action on February 19, 2008, thereby according a PTO Delay of 1007 days. Applicants do not dispute herein this patent term adjustment calculation for this PTO "A Delay."
- 2) Applicants filed a response to the above-referenced non-final rejection on June 9, 2008. Applicants were accorded a delay of 21 days for filing a reply outside of the three-month statutory period for response. Applicants do not dispute herein this patent term adjustment for Applicant Delay.

CERTIFICATE OF MAILING BY EFS-WEB FILING

I hereby certify that this paper was filed with the Patent and Trademark Office using the EFS-WEB system on this date: December 8, 2008

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- 3) The application was filed on March 18, 2004, and issued as a patent on October 21, 2008, more than three years later. No Request for Continued Examination was filed in this application. No PTO Delay was calculated for issuance of the patent after three years from filing. Applicants respectfully submit that the PTO's calculation of this PTO "B Delay" contains an error and that the correct PTO Delay for issuance beyond three years from filing is 245 days, as outlined further below.

REMARKS

Applicants have calculated the PTA in accordance with the clear intent of Congress. As outlined in *Wyeth v. Dudas* (*Wyeth et al. v. Jon W. Dudas*, U.S. District Court, D.C., CA No. 07-1492, Mem. Op. September 30, 2008), the only way that periods of time can "overlap" is if they occur on the same day, and if an "A delay" occurs on one calendar day and a "B delay" occurs on another, they do not overlap, and 35 U.S.C. § 154(b)(2)(A) does not limit the extension to one day. "A Delays" are defined as delays by the Office under 35 U.S.C. § 154(b)(1)(A), which guarantees prompt PTO response. "B Delays" are defined as delays by the Office under 35 U.S.C. § 154(b)(1)(B), which guarantees no more than 3-year application pendency.

The PTA for the instant patent, as currently calculated and shown on the face of the patent, relies on the premise that the application was delayed under § 154(b)(1)(B) before the initial three-year period expired.

The *Wyeth* court determined that this construction cannot be squared with the language of § 154(b)(1)(B), which applies "if the issue of an original patent is delayed due to the failure of the United States Patent and Trademark Office to issue a patent within 3 years," and that "B delay" begins once the PTO has failed to issue a patent within three years, not before.

In the current PTA calculation, the Office has only given credit for the larger of "A Delay" or "B Delay," rather than the combined sum of "A Delay" and "B Delay" (which does not include any days after three years from filing where "A" and "B" delays overlap).

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In this patent, "A Delay" should be calculated as 1007 days (for the delayed first Office Action), and "B Delay" should be calculated as 245 days (for issuance beyond three years from filing). Applicants note that while the entire pendency of the application beyond the three year date is 583 days, there are 338 days of "A Delay" that overlap with this time, and as such, only 245 days should be granted as "B Delay." Thus, the total PTO Delay should be calculated as 1252 days.

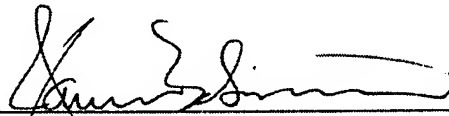
In consideration of the events described above, Applicants believe the PTA calculation of 986 days is incorrect. As such, Applicants respectfully request reconsideration of the patent term adjustment in the following manner:

- 1) Total PTO Delay should be calculated as 1252 days;
- 2) Total Applicant Delay should be calculated as 21 days; and
- 3) Total PTA should be calculated as 1231 days.

Applicants note that this patent is not subject to a terminal disclaimer.

Please apply the fee of \$200 required under 37 C.F.R. § 1.18(e) and any other required charges or credits to Deposit Account No. 06-1050.

Respectfully submitted,



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